

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
NORTHERN DIVISION

DAMON L. STEPHENS,

Petitioner,

v.

Criminal Case Number 06-cr-20365

Civil Case Number 11-cv-14377

UNITED STATES OF AMERICA,

Honorable Thomas L. Ludington

Respondent.

**ORDER ADOPTING REPORT AND RECOMMENDATION AND DENYING
PETITIONER'S MOTION TO VACATE SENTENCE UNDER 28 U.S.C. § 2255**

On January 15, 2012 Magistrate Judge Charles issued a Report and Recommendation, recommending that Petitioner's motion under 28 U.S.C. § 2255 to vacate, set aside, or correct his sentence be denied. ECF No. 82. Judge Binder concluded that Petitioner's ineffective assistance of counsel claims are procedurally barred because the appellate court already addressed the issues underlying the claims. In particular, the appellate court found that the evidentiary errors Petitioner alleged were harmless and, as a result, any claims that an attorney was ineffective for failing to raise these same errors are also procedurally barred. Alternatively, Judge Binder concluded that even if the claims were not procedurally barred, any failure on the part of counsel for not preventing the alleged errors that the Sixth Circuit concluded were harmless could not have prejudiced Petitioner as required under *Strickland v. Washington*, 466 U.S. 668 (1984). Finally Judge Binder concluded that an evidentiary hearing on Petitioner's motion was unnecessary because that was no material factual dispute that a hearing could address and "the files and the records of the case conclusively show[ed] that [Petitioner] is entitled to no relief." 28 U.S.C. § 2255(b).

On January 23, 2012, Petitioner requested an extension of time to file objections to the report

and recommendation, which was granted. ECF No. 84. Plaintiff was given a thirty-day extension, for a total of forty-four days, to file his objection to the report and recommendation. Because service of the report and recommendation was made by first class mail sent to Petitioner's address under Federal Rule of Civil Procedure 5(b)(2)(C), three days are added after the period would otherwise expire under Federal Rule of Civil Procedure 6(d). As a result, Petitioner's objections were due on or before February 21, 2012.

As of today's date, no party has filed any objections to the magistrate judge's report and recommendation. The failure to file objections to the report and recommendation waives any further right to appeal. *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Likewise, the failure to object to the magistrate judge's report releases the Court from its duty to independently review the record. *Thomas v. Arn*, 474 U.S. 140, 149 (1985).

Accordingly, it is **ORDERED** that Judge Binder's report and recommendation (ECF No. 82) is **ADOPTED**.

It is further **ORDERED** that Petitioners motion to vacate sentence under 28 U.S.C. § 2255 (ECF No. 75) is **DENIED**.

s/Thomas L. Ludington
THOMAS L. LUDINGTON
United States District Judge

Dated: February 24, 2012

PROOF OF SERVICE

The undersigned certifies that a copy of the foregoing order was served upon each attorney or party of record herein by electronic means and on Damon L. Stephens #26374039, McDowell FCI, P.O. Box 1009, Welch, WV 24801 by first class U.S. mail on February 24, 2012.

s/Tracy A. Jacobs
TRACY A. JACOBS